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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY A. HURTADO,

Defendant and Appellant.

D058979

(Super. Ct. No. SCD 157374)

APPEAL from an order of the Superior Court of San Diego County, Peter L. Gallagher, Judge. Reversed with directions.

A judge denied defendant Anthony Hurtado's motion to reduce a prior felony conviction to a misdemeanor after 10 years and successful completion of probation. Hurtado appeals, contending that the trial court failed to properly exercise its discretion when considering his motion. We agree with Hurtado, reverse the order, and remand the decision to another judge for consideration.

## FACTS AND PROCEDURE

In 1999, Hurtado, then 19 years old, solicited and obtained a videotape containing child pornography. San Diego postal inspectors, who were conducting a sting operation on the site, arranged for controlled delivery of the videotape. Hurtado later confirmed that he watched the videotape once and then threw it away. He also admitted to downloading approximately 50 digital images of child pornography featuring 8- to 12-year-old girls engaged in oral and vaginal sex with older men.

In 2001, Hurtado was charged with one count of causing the distribution of matter depicting a person under 18 involved in sexual conduct (Pen. Code,<sup>1</sup> § 311.1, subd. (a)); one count of advertising for sale and distribution of obscene matter depicting a person under 18 involved in sexual conduct (§ 311.10); three counts of possessing material depicting a person under 18 involved in sexual conduct (§ 311.11); and three counts of developing, duplicating, printing, and exchanging obscene matter depicting a person under 18 involved in sexual conduct (§ 311.3). Hurtado pleaded guilty to violating section 311.1, and all other charges were dismissed because they were barred by the relevant statutes of limitation. The court sentenced Hurtado to three years of probation and required him to register as a sex offender for the rest of his life pursuant to section 290.

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<sup>1</sup> All further statutory references are to the Penal Code.

In June 2010, Hurtado filed a motion to reduce his conviction to a misdemeanor pursuant to section 17, subdivision (b)(3).<sup>2</sup> He argued that he had successfully completed probation on July 1, 2004; he had no other criminal history; during probation, he voluntarily completed one year of therapy and voluntarily submitted to a polygraph examination; he was only 19 years old at the time of the offense; he was 30 years old at the time of the motion, had been gainfully employed for over 10 years with the same company, begun his own consulting business on the side, and had been married for two years. The district attorney filed a written opposition to the motion, arguing that, "some charges should always remain felonies simply because of the underlying conduct."

In consideration of the motion, defense counsel submitted supplemental information to the court in January 2011. This included a copy of Hurtado's statement made to police at the time of his arrest, in which he admitted to soliciting the video and throwing it away after watching it. In the statement, Hurtado apologized and acknowledged that his actions were wrong. Defense counsel also included copies of five psychiatric evaluations conducted between 2000 and 2010 to which Hurtado voluntarily submitted. The evaluations concluded that Hurtado's risk of recidivism was less than one percent, that he has no significant psychological problems, that his sexual interest

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<sup>2</sup> "When a crime is punishable, in the discretion of the court . . . by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] . . . [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." (§ 17, subd. (b)(3).)

indicates a "nondeviant" result, and that Hurtado does not present a risk to the community.

At a hearing later that same month, the district attorney stated that it was opposed to reducing the charges to a misdemeanor since "[t]his was not just a simple viewing or possession of material. This was a solicitation." Defense counsel argued that Hurtado was only 19 years old at the time of the offense, he threw the material away immediately after viewing it, he took two polygraph exams to prove he had no violations of his probation, and five psychologists found he was not a risk to the community.

The court stated that it had received the supplemental material from defense counsel and that it "looked at it." In ruling on the motion, the court merely said, "I think some conduct should stay felonies. I'm not going to reduce, but I will expunge." The court gave no other reasoning for its decision and adjourned the hearing without further discussion.

## DISCUSSION

On appeal, the burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.) A decision will not be reversed merely because reasonable people might disagree. (*Id.* at p. 978.)

Section 17, subdivision (b)(3) allows the reduction of "wobbler" offenses--crimes that, in the trial court's discretion, may be sentenced as either felonies or misdemeanors--upon imposition of a punishment other than imprisonment or by declaration as a misdemeanor after a grant of probation. (*Alvarez, supra*, 14 Cal.4th at p. 974.) The court's discretion is contextual, and factors which direct similar sentencing decisions are relevant, such as " 'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.' " (*Id.* at p. 978.) When considering these factors, the court should also consider the general objectives of sentencing set forth in the rules of the court. (*Ibid.*)

Even under the broad discretion conferred by section 17, subdivision (b)(3), such discretion implies the "absence of arbitrary determination, capricious disposition, or whimsical thinking." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) Courts must, at the very least, state the reasoning behind their decisions on the record.

Here, the court neglected to state on the record its reasoning for denying Hurtado's motion. All the court stated was that it "looked at" all the material provided by defense counsel, and that "I think some conduct should stay felonies." While the trial court is certainly entitled to the view that "some conduct should stay felonies," the Legislature declared section 311.1 to be a so-called "wobbler." That is, a violation of that section may be punishable *either* as a felony or a misdemeanor.

The court here offered no explanation or reasoning for its decision, other than the terse comment quoted above. There is no evidence that the court gave Hurtado or the

motion any individualized consideration, which is an abuse of discretion. Whatever the court's personal views may be, petitioners have the right to be heard and to have the request considered on the merits. There is nothing in the record that indicates that the court did either.

We will not disturb the court's exercise of judgment unless we find that no reasonable judge could have reached the same result. In this case, we simply do not have enough information before us to make that determination. There is a clear lack of consideration on the part of the trial court here. We therefore take no position on the issue of whether Hurtado's motion to reduce should be granted or denied, and remand this decision to superior court for consideration by a different judge, with orders to fully review and consider all materials.

#### DISPOSITION

The order is reversed and remanded for consideration by a different judge.

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HUFFMAN, J.

WE CONCUR:

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McCONNELL, P. J.

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O'ROURKE, J.